Kirba Daisy a/p John Das v Mahinder Singh a/l Bachittar Singh

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02–1465 OF 2010
KN SEGARA, SULAIMAN DAUDAND ABDUL WAHAB PATAIL JJCA
21 NOVEMBER 2011

Civil Procedure — Final judgment — Application to set aside — Judgment entered in absence of defendant at trial — Defendant neither filed notice of appeal nor application to file notice of appeal out of time — Defendant alleged not aware of progress of his case until receipt of copy of final judgment — Whether excuse unacceptable and unconvincing and without merit — Whether warrant judgment to be set aside ex debito justitice — Rules of the High Court 1980 O 35 r 2(1)

Civil Procedure — Functus officio — Final judgment — Application to set aside — Defendant neither filed notice of appeal nor application to file notice of appeal out of time — Trial judge allowed defendant's application and ordered a re–trial — Whether trial judge functus officio upon pronouncement of final judgment — Rules of the High Court 1980 O 35 r 2

The appellant ('plaintiff') had filed a defamation suit against the respondent ('defendant') for libel contained in an e-mail. There was an interlocutory application by the plaintiff to strike out the defence. In the meantime, the defendant's solicitors discharged himself but the plaintiff had not been served with the fair copy of the order of discharge by the defendant. However, the defendant, thereupon, informed the trial judge that he would not be engaging another lawyer and would argue the case himself. No notice of change to act in person was filed in the court by the defendant in Form 139, as provided under O 64 r 3 of the Rules of the High Court 1980 ('RHC'). As all the relevant documents had been served on the defendant but not responded to, the court fixed 30 March 2009 as the date for the full hearing of the plaintiff's case. On the date, the case came up for full trial before a different High Court judge (' HCJ ') (Siti Mariah J). The plaintiff's counsel was present but neither the defendant nor his counsel was present. Accordingly, on 31 July 2009 the HCJ gave judgment for the plaintiff and assessed damages at RM500,000. The defendant received a sealed copy of the judgment on 5 April 2009 but did not file any notice of appeal nor made any application to file a notice of appeal out of time. Instead, the defendant, through his solicitors, filed an application by way of summons in chambers, dated 8 January 2010, to set aside the judgment under O 35 r 2 and O 92 r 4 of the RHC. The application was not heard by the HCJ who had entered judgment. However, the HCJ who heard the application

allowed the defendant's application and ordered a re-trial. Hence, this appeal by the plaintiff against the order for a retrial.

Held, allowing the appeal with costs:

(1) The judgment obtained by the plaintiff on 31 July 2009 was a regular judgment. It was not null and void on the ground of illegality or lack of jurisdiction or breach of natural justice, to warrant the judgment to be set aside *ex debito justitiae*. If the defendant was dissatisfied on the issue of liability or the amount of damages awarded, he should mount an appeal against the decision of the HCJ and not attempt to set it aside on the alleged grounds of a breach of the rules of natural justice because he was not heard on the hearing date. He could not be now heard to say that he was absent because he was not informed of the hearing date (see para 13).

(2) The chronology of events, leading right up to the scheduling of the date of the full hearing on 30 March 2009, clearly showed that all reasonable attempts had been made for the defendant and/or his solicitors to be informed of the respective case management dates in order for him to participate at every stage of the case management, but he had clearly shown no interest in the matter, until he received a sealed copy of the final judgment. If he could have received a copy of the final judgment there is no reason why he could not have received all other communication with regard to the case management dates from his solicitors and/or the solicitors for the plaintiff (see para 14).

(3) O 35 r 2(1) of the RHC was not applicable to the factual matrix of this case as the HCJ was *functus officio* upon pronouncement of the final judgment on 31 July 2009. A HCJ cannot set aside the final judgment. The only remedy is by way of an appeal against the findings in the judgment to an appellate court (see para 15).

(4) In any event, an application under O 35 r 2(1) of the RHC to set aside a judgment given in the absence of a party must be made within 7 days after the trial (O 35 r 2(2)). In this case, it was made more than five months from the date of the judgment and more than one month from the receipt of a sealed copy of the judgment. The assertion that the defendant was not aware of the progress of his case until receipt of the copy of the final judgment was unacceptable and unconvincing and was without merit (see para 16).

(5) It was on record that the defendant had told the court he would not engage another lawyer and would argue the case himself. He had thereby taken it upon himself to use his best endeavors and responsibility to keep himself fully posted of the progress and development of his case, until its final disposal. It was futile and unacceptable for him to allege he had not

been kept informed by the court, and that the court had been dormant after the plaintiff's application to strike off his defence had been dismissed (see para 17).

[Bahasa Malaysia summary

Perayu ('plaintif') memfailkan tindakan fitnah terhadap responden ('defendan') bagi fitnah bertulis yang terkandung di dalam suatu e-mel. Plaintif membuat permohonan interlokutori untuk membatalkan pembelaan. Sementara itu, peguamcara defendan menarik diri tetapi plaintif tidak diserahkan dengan salinan meterai perintah penarikan diri oleh defendan. Walau bagaimanapun, defendan kemudian memberitahu hakim bicara bahawa dia tidak akan melantik peguam lain dan akan mewakili dirinya sendiri. Tidak ada notis pertukaran untuk bertindak secara sendiri difailkan di mahkamah oleh defendan dalam Borang 139, seperti yang diperuntukkan di bawah A 64 k 3 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Oleh sebab kesemua dokumen yang relevan telah diserahkan kepada defendan tetapi tiada jawapan, mahkamah menetapkan 30 Mac 2009 sebagai tarikh perbicaraan penuh kes plaintif. Pada tarikh tersebut, kes tersebut dipanggil untuk perbicaraan penuh di hadapan hakim Mahkamah Tinggi yang lain ('HMT') (Siti Mariah H). Peguam plaintif hadir tetapi defendan mahupun peguamnya tidak hadir. Dengan demikian, pada 31 Julai 2009 HMT memberikan penghakiman kepada plaintif dan menilai ganti rugi sebanyak RM500,000. Defendan menerima salinan meterai penghakiman pada 5 April 2009 tetapi tidak memfailkan apa-apa notis rayuan atau membuat apa-apa permohonan untuk memfailkan notis rayuan di luar masa. Sebaliknya, defendan, melalui peguamcaranya, memfailkan permohonan melalui saman dalam kamar, bertarikh 8 Januari 2010, untuk mengetepikan penghakiman tersebut di bawah A 35 k 2 dan A 92 k 4 KMT. Permohonan tersebut tidak didengar oleh HMT yang memasukkan penghakiman. Walau bagaimanapun, HMT yang mendengar permohonan tersebut membenarkan permohonan defendan dan memerintahkan perbicaraan semula. Maka, rayuan ini oleh plaintif terhadap perintah perbicaraan semula.

Diputuskan, membenarkan rayuan dengan kos:

(1) Penghakiman yang diperoleh oleh plaintif pada 31 Julai 2009 adalah penghakiman mengikut aturan. Ia tidak batal atau tidak sah atas alasan salah di sisi undang-undang atau tidak berbidang kuasa atau melanggar keadilan asasi, untuk mewajarkan penghakiman tersebut diketepikan ex debito justitiae. Jika defendan tidak berpuas hati dengan isu liabiliti atau jumlah ganti rugi yang diawardkan, dia sepatutnya merayu terhadap keputusan HMT tersebut dan bukan mencuba untuk mengetepikannya atas dakwaan alasan pelanggaran peraturan keadilan asasi kerana dia

tidak didengar pada tarikh perbicaraan. Dia tidak boleh kini menyatakan bahawa dia tidak hadir kerana tidak diberitahu mengenai tarikh perbicaraan (lihat perenggan 13).

(2) Kronologi peristiwa, sehingga kepada penjadualan tarikh perbicaraan penuh pada 30 Mac 2009, jelas menunjukkan bahawa kesemua cubaan yang munasabah telah dibuat untuk defendan dan/atau peguamcaranya diberitahu mengenai tarikh pengurusan kes masing-masing supaya dia boleh mengambil bahagian pada setiap peringkat pengurusan kes, tetapi dia jelas tidak menunjukkan minat dalam perkara tersebut, sehingga dia menerima salinan meterai penghakiman terakhir. Jika dia boleh menerima salinan penghakiman terakhir tidak ada alasan mengapa dia tidak boleh menerima komunikasi lain berkaitan dengan tarikh pengurusan kes daripada peguamcaranya dan/atau peguamcara plaintif (lihat perenggan 14).

(3) Aturan 35 k 2 KMT tidak beraplikasi kepada fakta matriks kes ini kerana HMT *functus officio* selepas memberikan penghakiman terakhir pada 31 Julai 2009. Seseorang HMT tidak boleh mengetepikan penghakiman terakhir. Satu-satunya remedi adalah melalui rayuan terhadap penemuan di dalam penghakiman tersebut kepada mahkamah rayuan (lihat perenggan 15).

(4) Walau apa pun, permohonan di bawah A 35 k 2(1) KMT untuk mengetepikan penghakiman yang diberikan dalam ketidakhadiran sesuatu pihak mesti dibuat dalam tempoh 7 hari selepas perbicaraan (A 35 k 2(2)). Di dalam kes ini, ia dibuat lebih daripada lima bulan daripada tarikh penghakiman dan lebih dari satu bulan daripada penerimaan salinan meterai penghakiman tersebut (lihat perenggan 16).

(5) Adalah dalam rekod bahawa defendan telah memberitahu mahkamah bahawa dia tidak akan melantik peguam yang lain dan akan menghujah kesnya sendiri. Dia, oleh itu, telah berjanji untuk berusaha dan bertanggungjawab untuk mengambil tahu secara penuh tentang progres dan kemajuan kesnya, sehingga pemutusan terakhir. Adalah sia-sia dan tidak boleh diterima untuk dia mendakwa bahawa dia tidak diberitahu oleh mahkamah, dan bahawa mahkamah telah menjadi dorman selepas permohonan plaintif untuk membatalkan pembelaannya ditolak (lihat perenggan 17).]

Notes

For cases on functus offcio, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3082–3105.

Legislation referred to

Rules of the High Court 1980 O 35 r 2(1), (2), O 64 rr 3, 5(1), O 92 r 4, Form 139

Appeal from: Civil Suit No 4–22–1 of 2004 (High Court, Shah Alam)

M Manoharan (M Manoharan & Co) for the appellant.
Ramesh N P Chandran (Revincer with him) (Remuka Rabindranath & Associates) for the respondent.

KN Segara JCA (delivering judgment of the court):

[1] The appellant (plaintiff) had filed a defamation suit against the respondent (the defendant) on 2 January 2004 at the Shah Alam High Court for libel contained in an e-mail dated 27 September 2003. On 17 February 2004 the defendant's solicitors M/s Rajadevan & Associates filed the defendant's statement of defence.

[2] On 7 December 2005, M/s Rajadevan & Associates discharged themselves from representing the defendant. There was an interlocutory application by the plaintiff to strike out the defence. It was fixed for hearing before the High Court judge (HCJ) (Alizatul Khair J) on 7 April 2006.

[3] On 7 April 2006, the defendant was present in court. Counsel for defendant was not present. Counsel for plaintiff who was present informed the HCJ that the plaintiff's solicitors have not been served with the fair copy of the order of discharge by the defendant's solicitors. Order 64 r 5(1) of the Rules of the High Court 1980 ('RHC') provides that unless and until the solicitor serves on every party in the cause or matter a copy of the order, he shall be considered the solicitor of the party till the final conclusion of the cause or matter. However, the defendant, thereupon, informed the HCJ that he will not be engaging another lawyer. He stated that he would argue the case himself. Nevertheless, the court postponed the hearing of the plaintiff's interlocutory application to strike out the defence to 2 October 2006. It is to be noted that no notice of change to act in person was filed in court by the defendant in Form 139, as provided under O 64 r 3 of the RHC.

[4] On 2 October 2006, neither the plaintiff nor his counsel was present. The defendant was present personally. He had no counsel. The court dismissed with costs the plaintiff's application to strike out the defence.

[5] On 3 May 2007, the case was fixed for case management before the same HCJ who had dismissed the plaintiff's application to strike off the defence on 2 October 2006. The parties were not present and the HCJ fixed 14 September 2007 for case management.

[6] On 14 September 2007 ('case management') counsel for plaintiff was present. The defendant was not present but counsel (En Sanjev), *on behalf of the*

solicitors still on record for the defendant, appeared and informed the court that an order for discharge had been obtained on 7 December 2007. However, there was no evidence that the order of discharge had been served on the defendant personally. Until the order of discharge has been served on the defendant the solicitors are still on record and *answerable to the court* for the conduct of the defendant's case until its final disposal. This includes keeping the defendant informed of the progress of the case and, in the particular circumstances of this case, the case management dates. On 14 September 2007 the HCJ, thereupon, ordered:

(1) Counsel to inform Defendant.

(2) En Sanjev to reserve order on Defendant and plaintiffs solicitors and file affidavit of service. Ke22/11/2007(Sebutan).

[7] On 22 November 2007 counsel for the plaintiff was present but neither counsel nor the defendant was present. Counsel for the plaintiff informed the court that he had served by AR register a letter informing the defendant of the date but the letter was returned. The HCJ thereupon made the following order:

(1) Plaintiff to file ikatan Pliding, Ikatan Dokumen, Isu dan Facta sebelum hujung February 2008.

(2) Ke 24 April 2008 (Case Management) (Final).

[8] On 24 April 2008 counsel for plaintiff was present and informed the court that he had sent all the relevant documents to the defendant on 5 December 2007 but had no response. He informed the court that he had only one witness. The court fixed 30 March 2009 as the date for the full hearing of the plaintiff's case.

[9] On 30 March 2009 the case came up for full trial before a different HCJ (Siti Mariah J). The plaintiff's counsel was present but neither the defendant nor his counsel was present. Only one witness, that is, the plaintiff herself, was called to testify at the trial. On 31 July 2009 the HCJ gave judgment for the plaintiff and assessed damages at RM500,000.

[10] The defendant received a sealed copy of the judgment on 4 December 2009. He did not file any notice of appeal nor make any application to file a notice of appeal out of time. The defendant, instead, through his solicitors filed an application by way of summons in chambers, dated 8 January 2010, to set aside the judgment entered on 31 July 2009 under O 35 r 2 and O 92 r 4 of the RHC 1980.

[11] The application was not heard by the HCJ who had entered judgment

on 31 July 2009. However, the HCJ who heard the application allowed the defendant's application and *ordered a re-trial*. A

[12] This appeal before us is by the plaintiff against the order for a retrial, pursuant to an interlocutory application to set aside a final judgment, after evidence had been adduced by the plaintiff albeit in the absence of the defendant and his counsel. B

[13] We are of the view that the judgment obtained by the plaintiff on 31 July 2009 was a *regular* judgment. It was not null and void on the ground of illegality or lack of jurisdiction or breach of natural justice, to warrant the judgment to be set aside ex debito justitiae. If the defendant was dissatisfied on the issue of liability or the amount of damages awarded, he should mount an appeal against the decision of the HCJ made on 31 July 2009 and not attempt to set it aside on the alleged grounds of a breach of the rules of natural justice because he was not heard on the hearing date. He cannot be now heard to say that he was absent because he was not informed of the hearing date. C D

[14] The chronology of events, leading right up to the scheduling of the date of the full hearing on 30 March 2009, clearly shows that all reasonable attempts had been made for the defendant and/or his solicitors to be informed of the respective case management dates in order for him to participate at every stage of the case management, but he had clearly shown no interest in the matter, until he received a sealed copy of the final judgment. If he could have received a copy of the final judgment we see no reason why he could not have received all other communication with regard to the case management dates from his solicitors and/or the solicitors for the plaintiff. The court was not obliged to communicate directly with him at his address as he had not filed Form 139 (NOTICE OF INTENTION OF PARTY TO ACT IN PERSON, IN PLACE OF SOLICITOR). E F G

[15] In the above circumstances, O 35 r 2(1) of the RHC is not applicable to the factual matrix of this case and in our view the HCJ is *functus officio* upon pronouncement of the final judgment on 31 July 2009. A HCJ cannot set aside the final judgment. The only remedy is by way of an appeal against the findings in the judgment to an appellate court. H

[16] In any event, an application under O 35 r 2(1) of the RHC to set aside a judgment given in the absence of a party must be made within seven days after the trial (O 35 r 2 (2)). In this case, it was made more than five months from the date of the judgment and more than one month from the receipt of a sealed copy of the judgment. The assertion that the defendant was not aware of the progress of his case until receipt of the copy of the final judgment is unacceptable and unconvincing and without merit. I

[17] It is on record that the defendant had told the court he will not engage another lawyer and would argue the case himself. He had thereby taken it upon himself to use his best endeavors and responsibility to keep himself pasted of the progress and development of his case, until its final disposal. It is futile and unacceptable for him to allege he had not been kept informed *by the court*, and that the *court* had been *dormant* after the plaintiff's application to strike off his defence had been dismissed.

[18] We are not convinced by any plea that the defendant was under the impression that the case had in fact been disposed off in his favour, upon the plaintiff's application to strike off his defence had been dismissed. No indulgence and flexibility can be accorded to a litigant merely because he was purportedly unrepresented and ignorant of the rules of procedure. If he complains that there has been an injustice occasioned to him, then he is the sole cause for the same accept the consequences.

[19] In the above circumstances, the appeal is allowed with costs fixed at RM10,000. The judgment of the High Court judge dated 31 July 2009 is reinstated. Deposit refunded to the appellant.

Appeal allowed with costs.

Reported by Ashgar Ali Ali Mohamed